No. 83-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF AUSTIN, TEXAS, AND
LOWER COLORADO RIVER AUTHORITY,

Petitioners,

v.

DECKER COAL COMPANY, A JOINT VENTURE,
WYTANA, INC., AND WESTERN MINERALS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, under Montana law, the Court of Appeals for the Fifth Circuit properly interpreted the term "regulation" as used in a contract between petitioners and respondents.*

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* Pursuant to SUP. CT. R. 28.1, the parent companies, subsidiaries, and affiliates of the named Respondent Corporations are as follows: Peter Kiewit Sons', Inc. and Pacific Power & Light Co.

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STATEMENT OF THE CASE

Respondents Decker Coal Company, *et al.* disagree in several respects with petitioners' statement of the case; however, these differences do not appear relevant to the question of whether certiorari is granted. Accordingly, for purposes of this Brief in Opposition only, respondents accept petitioners' statement of the case.

SUMMARY OF ARGUMENT

Petitioners seek certiorari from the decision of the U.S. Court of Appeals for the Fifth Circuit in *City of Austin v. Decker Coal Co.*, 701 F.2d 420 (5th Cir. 1983), construing the terms of a coal supply contract between the parties. However, petitioners have failed to demonstrate that this case is worthy

of the attention of the Supreme Court. None of the considerations set forth in Supreme Court Rule 17 are present. The case is a diversity proceeding involving nothing more than the construction of a contract under Montana law, which was correctly and equitably construed by the Court of Appeals.

ARGUMENT

I. None of the Recognized Bases for Certiorari are Present in This Case.

The Petition for Certiorari fails to mention Supreme Court Rule 17, for the telling reason that none of the recognized bases for certiorari set forth in that Rule are present in this case. This is a contract dispute which presents no federal question; no conflict among the circuits; no departure from accepted judicial proceedings; nor any other significant issue warranting an exercise of this Court's discretionary power of certiorari.

As the parties stipulated and both courts below agreed, the case was governed by Montana state law. The Court of Appeals merely applied Montana's statutes and rules of contract interpretation to construe a private contract. Faced with a burgeoning caseload, this Court is understandably disinclined to grant certiorari where the only issue is an alleged misinterpretation or conflict with state law.[1] For example, in *Butner v. United States*, 440 U.S. 48, 57-58 (1979), four federal judges had divided evenly over a state law question, just as occurred in this case. Nevertheless, the Court stated emphatically that "[w]e did not grant certiorari

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1. In 1980, the Supreme Court dropped from the list of recognized grounds for certiorari instances in which an appeals court has decided "an important state . . . question in a way in conflict with applicable state . . . law." Sup. Ct. R. 19(1)(b), 42 F.R.D. 94 (1967). "Its deletion suggests, at the least, a diminished interest on the Court's part in reviewing diversity of citizenship cases where the only issue is an alleged conflict with applicable state law." Boskey & Gressman, *The Supreme Court's New Rules For The Eighties*, 85 F.R.D. 487, 505 (1980).

to decide whether the Court of Appeals correctly applied [state] law." *Id.* at 51.

Petitioners presented all of the arguments now made in the Petition for Certiorari to the Fifth Circuit in a Petition for Rehearing and Suggestion for Rehearing *En Banc*. None of the thirteen Fifth Circuit judges who reviewed those pleadings — including the judge who dissented from the majority's decision — considered this case worthy of rehearing by the Circuit Court. 705 F.2d 1448 (5th Cir. 1983). Neither does it merit an exercise of the Supreme Court's discretionary power of certiorari.

II. The Financial Impact of This Case Has Been Greatly Exaggerated by Petitioners and is Not Relevant to the Granting of Certiorari.

Petitioners have speculated that the impact upon them of the decision below may be as much as $350 million dollars. Even a cursory perusal of the Fifth Circuit's opinion, however, makes it clear that the court below expressly rendered no decision whatsoever as to the amount of the cost reimbursement which petitioners may ultimately be required to pay. 701 F.2d at 431. The opinion below consisted of only a legal determination that the parties intended a certain kind of increased mining cost to be added to the price of the coal. The magnitude of such cost reimbursements, if any, remains to be determined in a factual hearing before the trial court.

In fact, the maximum cost reimbursement to which respondents may be entitled in this case is (in present day dollars) less than one-fourth of petitioners' inflated $350 million dollar figure. More significantly, whatever cost reimbursement is deemed recoverable will be spread out over the entire 26-year term of the contract, and presumably will be apportioned among the millions of utility customers served by petitioners, which places in proper perspective the financial impact of this case. The hue and cry raised by petitioners regarding the "public" importance of this case is largely illusory.

The nature of the contract between the parties also bears mention. That contract provides for the mining, delivery and purchase of more than 50 million tons of coal over a period extending well into the 21st century. There have already been numerous uncontested cost increases passed through to petitioners, and the total economic value of the contract today exceeds $1 billion dollars, even if no further cost increases occur. Viewed in this light, the cost reimbursements sought by respondents are neither extreme nor unreasonable, but simply reflect the magnitude of the underlying contract.

Finally, as noted, respondents' entitlement to such price reimbursements was not finally established by the decision below and must await an additional factual hearing. Petitioners' present attempt to quantify these increases is therefore nothing more than speculation.

III. This Case Has Neither Sufficient Significance Nor Broad Enough Impact to Warrant Granting Certiorari.

The decision below affects only the parties to a single contract, despite petitioners' efforts to characterize its impact as more far-reaching. This case will not predetermine the manner in which any other contracts are construed — even those involving similar language and one or more of the same parties. To the extent that these other contracts may require interpretation, this will be done by different courts applying different state laws and evaluating each contract on its own merits.

It is therefore quite possible that entirely different interpretations will legitimately be applied to other contracts, notwithstanding superficial similarities to the agreement construed by the court below. Moreover, if other courts should choose to give some weight to the opinion below, that will not be because it is a binding precedent, but rather because the careful analysis and reasoning of the majority are persuasive.

In sum, a decision by the Supreme Court in this case would not establish any guiding precedent and would not resolve any important legal issues. The Court would simply

be interpreting a particular coal supply contract between discrete parties.

IV. The Decision of the Court Below is Equitable and Reasonable.

Petitioners have attempted to characterize the Fifth Circuit's decision as unfair because any cost reimbursements ultimately allowed to respondents will be spread among more than a million consumers of electrical power and because a potential has been created for additional future cost reimbursements of a similar nature.

These arguments disregard the Fifth Circuit's finding that the parties intentionally agreed to allocate the very category of costs at issue in exactly this manner. Indeed, it would be manifestly unfair and unreasonable if, as petitioners now argue, such cost increases were to be imposed upon the sellers of the coal.

As the terms of the contract make clear, the parties intended to create a business relationship, typical in the mining industry, whereby the utility companies buying the coal obtained a long-term (26 year), dependable source of energy, while the mining company selling the coal received comprehensive assurances that all increased mining costs arising after a base date could be passed through to the buyers. Any other interpretation would frustrate the basic purpose of the contract, because the costs of mining the coal would inevitably exceed the base price and coal production would necessarily come to a halt. In this context, the court below properly concluded that a state administrative agency's discretionary exercise of delegated statutory authority to ban mining in a particular area constituted "regulation" as that term was used by the parties in their contract.

V. Summary.

Reduced to its basic elements, this case presents nothing more than the interpretation of a contract under Montana law. Petitioners' attempt to inflate its importance by refer-

ring to large dollar amounts is speculative and somewhat misleading, given the pending factual hearing on what (if any) reimbursement for increased mining costs is due to respondents. It is simply not the type of case which deserves this Court's attention.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

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